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One would have thought it settled by *Chicago & Northwestern Ry. Co. v. Whitton*, 13 Wall. 270, that, from the point of view of federal jurisdiction, such a corporation is looked upon in every respect as belonging to the State within whose limits the action in question is brought. Strange as it may seem that the same stockholders are conclusively presumed in Illinois to be citizens of Illinois and in Kentucky to be citizens of Kentucky, this paradox is no stranger than is the conclusive presumption in any State that the shareholders in its corporations are citizens, when in fact they are not. And the proposition of Whitton's case is equally true whether the incorporation in the State where the action is brought took place at the same time as in another State, or at a subsequent time. The acts in either case were wholly distinct, and the resulting corporations are two, not one. If this is true, the defendant was a Kentucky corporation so far as the present action was concerned, and the federal court had no jurisdiction.

The only decision of the Supreme Court of the United States which trenches upon the theory here laid down is *St. L. & S. F. Ry. Co. v. James*, 161 U. S. 545. The defendant corporation in that case was first incorporated in Missouri, and later in Arkansas. The plaintiff, too, was a citizen of Missouri, and sued upon a cause of action arising in Missouri, in the federal court sitting in Arkansas. He sued the railroad as an Arkansas corporation. The whole matter was so extreme, so palpable the subterfuge, that the court may well have hesitated. They may well have deemed it improper in such a case for a citizen of the first State to use the new incorporation as a stepping-stone to the federal courts. Stress is laid in the opinion on the fact that not only was the plaintiff a citizen of the State where the stockholders first became a body corporate, but the cause of action arose there as well. On this ground the case of *Chicago & Northwestern Ry. Co. v. Whitton*, *supra*, is distinguished. A careful reading of the opinion reveals no intention on the part of the court to overrule a case, which is cited with approval — *M. & C. R. R. Co. v. Alabama*, 107 U. S. 581 — where the facts were similar to the principal case, the precise question was expressly discussed, and the opposite conclusion reached. The only modification of the accepted rule intended by the court was in a suit obviously collusive. The rule was left intact that a corporation such as the present one belongs to the second State for the purposes of actions brought by citizens of that State upon causes of action arising within its limits.

RECENT CASES.

BANKRUPTCY—EFFECT OF NATIONAL ACT UPON STATE INSOLVENCY LAWS.—The United States bankruptcy law declares that the act shall go into full force and effect upon its passage, but provides that no voluntary petition shall be filed within one month, and no involuntary petition shall be filed within four months from that time. *Held*, that the act superseded State insolvent laws from the date of its passage. *Parmenter Mfg. Co. v. Hamilton*, 51 N. E. Rep. 529 (Mass.).

The previous United States bankruptcy act of 1867 was generally construed so as to permit actions under the State insolvency laws during the period which elapsed between the passage of the law and the date when petitions could be filed. *Day v. Bardwell*, 97 Mass. 246; *Martin v. Berry*, 37 Cal. 208. The different conclusion reached in the principal case was based largely upon the construction of the words,

not contained in the former act, that the law should go into full force and effect upon its passage. This clause is taken to indicate the intention of Congress that the law should go into general operation before proceedings could be commenced under it. Since every law becomes operative upon its passage, the declaration in the present act that it should at once have full force and effect would be entirely meaningless unless this construction is adopted. The case is likely to be followed in other jurisdictions.

BILLS AND NOTES — FORGED INDORSEMENTS. — The drawer of a check handed it to A. to deliver to the payee. A., however, forged the name of the payee and made delivery to the defendant, who took for value and without notice of the forgery. In like ignorance the plaintiff, the drawee, then paid the amount of the check to the defendant. In an action to recover back the amount paid, *held*, that the plaintiff is entitled to judgment. *First National Bank v. Farmers' & Merchants' Bank*, 76 N. W. Rep. 430 (Neb.). See NOTES.

BILLS AND NOTES — TRANSFER — NOTICE. — The defendant made a promissory note but had personal equitable defence to any action thereon by the payee. The payee then indorsed the note to the plaintiff. *Held*, that the defence is not available against the plaintiff if he received the note in good faith, though he had sufficient notice to put a reasonable man upon inquiry. *Mulberger v. Morgan*, 47 S. W. Rep. 379 (Tex., Civ. App.); *Lehman v. Press*, 76 N. W. Rep. 818 (Iowa).

The cases are in agreement with the great majority of decisions and express the better view. See 12 HARV. LAW REV. 213.

CONSTITUTIONAL LAW — ANTI-TRUST ACT. — *Held*, that the United States Anti-Trust Act is constitutional and prohibits any combination among competing railroad companies engaged in interstate commerce to establish and maintain rates, whether the rates are unreasonable or not. *United States v. Joint-Traffic Ass'n*, 19 Sup. Ct. Rep. 25.

In construing the statute the opinion reaffirms the doctrine of *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290; 11 HARV. LAW REV. 51, 126. See Prentice and Egan, Commerce Clause, 317. It also carefully limits its application to contracts, the direct and immediate effect of which is to restrain interstate commerce. Compare *Hopkins v. U. S.*, 19 Sup. Ct. Rep. 40; 12 HARV. LAW REV. 278; *Anderson v. U. S.*, 19 Sup. Ct. Rep. 50. The case is especially noteworthy, however, as deciding for the first time the constitutionality of the statute as previously interpreted. There is great difference of opinion on the point, but the decision is probably correct. The act is authorized by the power of Congress to regulate interstate commerce, unless it is forbidden by the fifth constitutional amendment as depriving persons of liberty without due process of law. However "liberty" is construed, the statute is valid unless it is not due process of law, and it is hardly oppressive and arbitrary enough to be held void on that ground. The prohibition of agreements thought to be dangerous to public welfare has been common in legislation from the earliest times; if Congress deem it advisable to forbid all combinations to fix interstate commerce charges in order to prevent those combinations which are injurious, the courts are not called upon to interfere. *Powell v. Pennsylvania*, 127 U. S. 678. See 11 HARV. LAW REV. 80.

CONSTITUTIONAL LAW — CRIMINAL LIABILITY — ACTS DONE UNDER AN UNCONSTITUTIONAL STATUTE. — A statute repealed a law which imposed upon the defendants, who were public officers, a certain duty, the neglect of which was criminal. *Held*, that the defendants are not indictable for the neglect of such duty, if they relied upon the repealing statute, *bonâ fide* believing it to be constitutional, although it was afterwards declared unconstitutional by the courts. *State v. Godwin*, 31 S. E. Rep. 221 (N. C.).

The case seems to be correct on principle, although there is a direct conflict of authority on the question. Many jurisdictions hold that when a legislative enactment proves to be invalid, it is, for all legal purposes, as if it had never existed; and, before it has been declared unconstitutional by the courts, acts done or duties neglected by a public officer, *bonâ fide* believing it to be valid and in reliance upon it, are, according to the general rule, not excused by his ignorance of the law. *Sumner v. Beeler*, 50 Ind. 341; *Campbell v. Sherman*, 35 Wis. 103. The better and more just doctrine, however, appears to be that the officer is protected unless the statute relied upon appears on its face clearly unconstitutional. *Henke v. McCord*, 55 Iowa, 378; *Sessums v. Botts*, 34 Tex. 335.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — ANTI-TRUST ACT. — Appellants were members of the Kansas City Stock Exchange, a combination of commission merchants engaged in selling on commission the live stock received at the stockyards of Kansas City. They drew up rules limiting rates to be charged, and further regulating the business. *Held*, that this combination is not a restraint of trade within the Anti-Trust Act of 1890, since it does not directly concern interstate commerce. *Hopkins v. United States*, 19 Sup. Ct. Rep. 40. See NOTES, 12 HARV. LAW REV. 278.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — POLICE POWER. — Defendant purchased liquor in North Carolina and proceeded to transport it in a buggy to his home in South Carolina. He was arrested in the latter state and convicted under a statute which provided that any person handling and hauling contraband liquors in the night-time should be guilty of a misdemeanor. *Held*, that such statute is not unconstitutional, as permitting an interference with interstate commerce. *State v. Holleyman*, 31 S. E. Rep. 362 (S. C.).

The decision is by an evenly divided court. It is contended by one of the judges who upheld the conviction that although there is an interference with an interstate commerce transaction, yet it is permitted by the "Wilson Bill." This, however, seems unsound. By the provisions of that act, each State is given the power to make laws affecting goods upon their arrival within the state, and the opinion of the dissenting judges that such goods are not subjected to state laws until they reach the consignee at their destination seems to be in consonance with the construction of the United States Supreme Court. *Rhodes v. Iowa*, 170 U. S. 412, 420. Still, the case may be supported upon the view taken by another of the judges, namely, that defendant was not engaged in an interstate commerce transaction. It would scarcely be contended that a person who is travelling home with a suit of clothes which he has purchased in a neighboring state, could claim to be engaged in interstate commerce, and the position of the present defendant is strictly analogous. It is conceded that the statute in question is a valid exercise of the police power.

CONSTITUTIONAL LAW — SIDEWALK ORDINANCE — REMOVAL OF SNOW. — A city ordinance required every occupant or owner of property to keep the snow removed from the sidewalk adjoining his premises. *Held*, that such an ordinance is unconstitutional since it imposes unequal burdens, and is equivalent to unequal taxation and to a taking of property without due process of law. *State v. Jackman*, 41 Atl. Rep. 347 (N. H.).

The case well illustrates the petty views of the scope of the great constitutional guarantees here invoked, which some courts insist on holding and applying with such mistaken zeal. The decision is supported by *Gridley v. Bloomington*, 88 Ill. 554, and by *Chicago v. O'Brien*, 111 Ill. 532, but it is nevertheless erroneous. The ordinance is an eminently fair and just one, not at all arbitrary or oppressive. It provides an equitable method of apportioning the burden of a public duty among the class of citizens most interested in its performance, and so situated as to be able most conveniently to attend to it. See *contra* to the principal case, *Goddard, Petitioner*, 16 Pick. 504; *Carthage v. Frederick*, 122 N. Y. 268; *Reinken v. Fuehring*, 130 Ind. 382. The reasoning of Shaw, C. J., in the first of these cases, seems unanswerable. There is really no taking of property, no taxation. The regulation is simply an exercise of ordinary police powers.

CONSTITUTIONAL LAW — TAXATION — PATENTS. — In taxing the capital stock of a corporation, patent rights owned by the company were included. *Held*, that this was error, for patent rights are not subject to State taxation. *People v. Board of Assessors*, 51 N. E. Rep. 269 (N. Y.).

A state law taxing shares of stock in a corporation provided that the value of the shares should be determined by making certain deductions from the aggregate value of the capital stock and dividing the residuum by the number of shares. *Held*, that patent rights owned by the company can be included in assessing the aggregate value of the capital stock. *Crown Cork & Seal Co. v. State*, 40 Atl. Rep. 1074 (Md.).

The latter case contains a *dictum* to the effect that patent rights are directly taxable by the State, but the opinion of the New York court upon this question seems quite correct. It may be conceded that a tax on patent rights is not levied upon the agencies of the Federal government within the rule in *McCulloch v. Maryland*, 4 Wheat. 316, and it is undoubtedly true that the patented articles are completely subject to State legislation. *Patterson v. Kentucky*, 97 U. S. 507. Yet, the principle of the supremacy of Federal laws within their constitutional sphere requires that the incorporeal right to exclude others from using the invention, being derived from the laws of the United States, should not be abridged by State taxation. To this effect is the weight of authority. *In re Sheffield*, 64 Fed. Rep. 833. But see *People v. Campbell*, 138 N. Y. 543, 547.

In the Maryland case, however, the tax was laid not on the capital stock but on the shares thereof. This distinction is technical but sound, and is established by authority. 2 Cook, Corporations, 4th ed., §§ 561, 563, 568. Consequently, admitting that capital stock consisting of patent rights is non-taxable, the shares should not be included in the exemption. Cf. *Shelby Co. v. Union, &c. Bank*, 161 U. S. 149. It is, apparently, immaterial that non-taxable property is taken into consideration in reckoning the amount of a tax on legitimate subjects. *Society for Savings v. Coite*, 6 Wall. 594. Therefore, the recent decisions in New York and Maryland are reconcilable, and both are in accordance with principle.

CONTRACTS—COMPROMISE—CONSIDERATION.—The defendants promised the plaintiffs to perform a certain railroad reorganization agreement. The alleged consideration for that promise was that the plaintiffs, the reorganization committee, should discontinue certain litigation pending against the defendants. In an action to enforce the contract, *held*, that this forbearance to press a disputed claim constitutes a good consideration. *Cox v. Stokes*, 51 N. E. Rep. 316 (N. Y.). See NOTES, 12 HARV. LAW REV. 276.

CONTRACTS—EXECUTORS AND DEVISEES.—At the death of testator certain houses contracted by him to be built on his land were not completed. The executor attempted to rescind the contract in the interest of the personal estate. In an administration suit, *held*, that the devisee of the land is entitled to have the work completed at the expense of the personal estate. *In re Day*, [1898] 2 Ch. D. 510.

The question here presented seems not often to have been considered by the courts. In general the executor has the legal power to dispose of his testator's surviving contracts at his discretion for the best interests of the estate. *Schouler, Execs. and Admrs.*, § 251; *Woerner, Admrs.*, 791. A clear distinction seems possible, however, between surviving contracts which were entered into for the permanent benefit of the inheritance, and those, the principal object of which was a personal benefit to the testator, which object is immediately defeated by his death. The former class, including the contract in the principal case, should be performed as intended by the testator, while the latter seem not properly subject to a claim of the heir or devisee of the land. *Gray v. Hawkin's Admr.*, 8 Ohio St. 450.

CRIMINAL LAW—LARCENY—FIXTURES.—*Held*, that copper boxes connected with a still in such a way as to make them part of the freehold are subjects of larceny. *Clement v. Commonwealth*, 47 S. W. Rep. 450 (Ky.).

This decision is plainly at variance with the common law. At the common law things that in any way savored of realty were not the subjects of larceny. The case rests upon the authority of an earlier Kentucky decision, *Smith v. Commonwealth*, 14 Bush, 31, in which it was held that the taking of chandeliers attached to gas pipes in the wall of a house, with intent to steal, was larceny, although the same court has held, contrary to the weight of authority, that such chandeliers are real estate. *Johnson v. Wiseman*, 4 Met. 357 (Ky.). The decisions can only be regarded as judicial legislation upon a subject which would better have been left to statutory regulation.

EQUITY—POLITICAL PARTIES—JURISDICTION.—A bill in equity was filed to restrain a chairman of a county committee of a political party from erasing from the roll of such committee the names of duly elected members. *Held*, that the bill should be dismissed. *Kearns v. Howley*, 41 Atl. Rep. 273 (Pa.).

It is generally agreed that equity has no jurisdiction to interfere in the internal affairs of a voluntary association, even where the duties and obligations of members are regulated by contract, unless property rights are involved. *Kerr, Injunctions*, 3d ed., 564. Cf. *O'Hara v. Stack*, 90 Pa. St. 477. The present case is even stronger; for defendant was clearly under no contractual obligation to plaintiffs on which the bill might be founded. The great difficulties in the way of judicial interference in such a case furnish an additional reason for the refusal to entertain jurisdiction. 2 Story, *Equity Jurisprudence*, 13th Ed., 263. Cf. *Graves v. Graves*, 13 Ir. Ch. 182.

EQUITY PROCEDURE—PLEAS.—The defendant in a suit in equity filed a plea setting up, in bar of the suit, matter already alleged in the bill. *Held*, that the plea is bad, since the objection should have been taken by demurrer. *Davis v. Davis*, 41 Atl. Rep. 353 (N. J., Ch.).

This unquestionable decision follows from the very nature of a plea in equity, which is to set up new matter. In early times this principle was carried so far that negative pleas were not allowed. *Langdell, Equity Pleading*, § 102. If a defendant could thus reiterate facts alleged by plaintiff, the latter might take issue on the plea, and then the absurdity would be presented of a party traversing an allegation which he had already admitted on the record. For the civil law maxim, *qui ponit fatetur*, prevails also in equity.

EVIDENCE—CONFESIONS.—On a trial for murder, certain statements of the prisoner, made to a public officer, were admitted in evidence. The officer told the prisoner that he need not say anything unless he wished to, and that what he said might be used for him or against him. On exceptions, *held*, that the evidence was properly admitted. *Roesel v. State*, 41 Atl. Rep. 408 (N. J., C. A.).

The general rule is well settled that confessions can never be admitted in evidence when the prisoner in making them has been in the slightest degree influenced by any threat or promise of favor as regards the trial, if such threat or promise is made by an officer of the State. *Bram v. U. S.*, 168 U. S. 532. It has been decided that a mere

statement that what the prisoner said might be used against him does not invalidate a confession, as no threat is implied. *Reg. v. Baldry*, 2 Den. C. C. 430. The principal case goes a step further; yet it is only by putting a very strained construction on the words that one can find any threat or promise implied in them. The words merely state that what the prisoner said would be put in evidence, and the court seem very properly to have held that this did not invalidate the confession.

FEDERAL JURISDICTION — CORPORATIONS. — A Kentucky statute provided that no foreign corporation should do business within the State without first complying with certain rules and becoming a corporation of Kentucky. Defendant was an Illinois corporation, and complied with the Kentucky statute. On being sued in Kentucky, by a citizen of that State, it obtained a removal to the federal court. On a motion to remand, *held*, that the defendant is, for the purposes of federal jurisdiction, a "citizen" of Illinois, and as such is entitled to have the action tried in the federal court. *Taylor v. Ill. Cent. R. R. Co.*, 89 Fed. Rep. 119 (Cir. Ct., Ky.). See NOTES.

INTERNATIONAL LAW — BREACH OF BLOCKADE. — A steamship was brought to ten miles to the northeast of a blockaded port and formally warned away. Four hours afterward she was captured seventeen miles to the northwest of the port. *Held*, that this loitering before a blockaded port was a breach of the blockade. *The Newfoundland*, 89 Fed. Rep. 99, 510 (Dist. Ct., S. C.). See NOTES.

LIBEL — SUFFICIENCY OF PUBLICATION. — A manager of a corporation, in connection with its business, dictated a libellous letter to a stenographer in the corporation's employment, who copied and mailed the same to plaintiff. *Held*, that the dictation, copying, and mailing constituted but a single act of the corporation, and did not amount to a publication of the letter. *Owen v. Ogilvie Pub. Co.*, 53 N. Y. Supp. 1033 (Sup. Ct., App. Div., Second Dept.).

The reason given for the decision is that a corporation ordinarily requires the action of both the manager and the stenographer to produce a letter and therefore the whole transaction constituted but the act of writing, thus precluding any separate communication to the stenographer. The argument is somewhat finely drawn, and it is difficult to appreciate any distinction because of the fact that the acting parties were the servants of a corporation rather than of a private individual. The court makes no mention of the case of *Pullman v. Hill*, [1891] 1 Q. B. 524, where the dictation of a letter by the manager of a firm to a stenographer was held to be a sufficient publication. See also *Boxsius v. Frères*, [1894] 1 Q. B. 842. *Pullman v. Hill*, *supra*, has been criticised on the ground that there could be no publication, since, when the letter was dictated there was no libel in existence. The mere uttering of words, although at the time it is intended that they should be written down, does not constitute libel but may constitute slander. Odgers, *Libel and Slander*, 174. If this criticism is sound, it affords a possible ground on which to support the principal case.

PLEADING — STATUTE OF LIMITATIONS. — Defendant demurred to a declaration in *assumpsit* which showed that the cause of action arose more than six years previous. *Held*, that the declaration did not state a good cause of action. *Crow v. Board of Commissioners of Grant County*, 54 Pac. Rep. 880 (N. Mex.).

The phraseology of the Statute of Limitations merely indicates that a defence is given to the defendant in a certain event, and not that the plaintiff has no cause of action. As early as the time of Charles II. it was decided that to take advantage of the statute it must be specially pleaded. *Puckle v. Moor*, 1 Ventris, 191. Chitty says that it is no objection to the declaration that the day of the promise appears to have been more than six years before the commencement of the action. Chit. Pl., 16th Am. ed., 273. Where the plaintiff relies on a waiver of the statute, he declares on the original cause of action and interposes the waiver by way of replication to the defendant's plea that the statutory period has run. *Illesley v. Jewett*, 3 Met. 439 (Mass.). If the defendant were allowed to demur to the declaration he could still prevent recovery although he had waived his defence. The principal case is contrary to the weight of authority, and seems indefensible on principle. 1 Saund. 283, note (2); Chit. Pl., 16th Am. ed. 506.

PROPERTY — ACCESSION — RELATIVE VALUES. — Defendant, an innocent trespasser, cut down the plaintiff's standing timber, and converted it into cross-ties. The value of the timber was thus increased six times. In an action of replevin, *held*, that the increase in value is not sufficient to entitle the defendant to the cross-ties. *Eaton v. Langley*, 47 S. W. Rep. 123 (Ark.). See NOTES.

PROPERTY — ANIMALS FERÆ NATURÆ. — A sea-lion escaped from the control of its possessor, and was abandoned by him. A year afterward it was recaptured by a fisherman seventy miles from the place of escape. *Held*, that the qualified right of property in the former possessor was lost by the escape. *Mullett v. Bradley*, 53 N. Y. Supp. 781 (Sup. Ct., App. Term). See NOTES.

PROPERTY — BOUNDARIES — ESTOPPEL. — A boundary line was run between the adjoining lands of plaintiff and defendant under a common misapprehension as to their legal rights, and was acquiesced in for five years. *Held*, that plaintiff is now estopped to assert his rights at law. *Pittsburg Iron Co. v. Lake Superior Iron Co.*, 76 N. W. Rep. 395 (Mich.).

It is undoubtedly true that a *bonâ fide* compromise of doubtful claims to land is binding on the parties. *Jones*, Real Property in Conveyancing, § 354. But where no actual agreement has been made to accept a boundary line as final, it seems that an estoppel would not be raised against a party, who has acquiesced therein for less than the statutory period, unless he had been guilty of a false representation whereby the other party was misled. *Story, Equity Jurisprudence*, 13th ed., §§ 385, 386; *Junction Ry. Co. v. Harpold*, 19 Ind. 347, 350; *Haso v. Plautz*, 56 Wis. 105. In the principal case the parties erroneously supposed the boundary to be the true one and the plaintiff does not appear by his words or actions to have influenced the defendant's conduct. On these facts it is hard to see how the doctrine of estoppel can correctly apply. *Hill v. Epley*, 31 Pa. St. 331, 334; *Sandford v. McDonald*, 53 Hun, 263; *Proprietors of Liverpool Wharf v. Prescott*, 7 Allen, 494.

PROPERTY — COVENANTS — EQUITABLE EASEMENTS. — A grantor, in conveying land, reserved to himself and his heirs the minerals beneath its surface with the right to remove the same by any subterranean process; it was also provided that no mine or air shaft should be intentionally opened or any mining fixtures established on the surface of said land. The grantee divided the land into lots, some of which he conveyed to defendants, who, having also acquired title through the grantor to the reserved mining privileges, proceeded to sink a shaft and erect mining fixtures. In a suit by the original grantee for an injunction to prevent this, *held*, that the injunction should be granted. *Electric City Land and Improvement Co. v. West Ridge Coal Co.*, 41 Atl. Rep. 458 (Pa.). Three Judges dissenting.

The court went on the ground that the provision that no shaft should be opened or fixtures established was a covenant running with the land. It is difficult to support the case on this ground, because it is well settled that the burden in such a case does not run. *Cook v. Arundel*, 1 Abr. Eq. 26. The provision seems to be an equitable easement. As such it would bind all parties who took with notice of it. *Fielden v. Slater*, L. R. 7 Eq. 523. The original deed was registered and therefore the defendants had notice. However there was no covenant as to how the surface of the land was to be used. The provision as to the use of the mines was for the protection of the surface owner as against the owner of the coal beneath. It was not intended to restrict the owner of the surface in the use of his land and it did not contemplate the ownership of the mines and of a portion of the surface being united in one person. When the proprietor of the coal became also a surface owner the effect of the proviso was destroyed. The view of the minority seems the sounder one.

PROPERTY — DONATIO MORTIS CAUSA. — One about to commit suicide indorsed a promissory note to the defendant, sealed it in an envelope addressed to the defendant, and placed it on a table beside his own bed. Then he shot himself. The defendant discovered and picked up the note while the donor was alive but unconscious. *Held*, that there was no delivery to defendant. *Liebe v. Battmann*, 54 Pac. Rep. 179 (Oreg.). See NOTES.

PROPERTY — EASEMENTS — REVIVAL. — Plaintiff and defendant were owners of adjoining buildings with a party wall between. Plaintiff had an easement in a stairway upon the defendant's premises, next to the party wall. The buildings were totally destroyed by fire. Upon a reconstruction of the buildings, with the stairway in the same location, *held*, that the easement revived. *Douglas v. Coonley*, 51 N. E. Rep. 283 (N. Y.).

A similar question appears never to have arisen in England or America. The analogies of the law of easements do not support the decision. The easement was not merely suspended, but wholly extinguished. *Shirley v. Crabb*, 138 Ind. 200. And it is the general rule that easements once extinguished can be created anew only by grant or prescription. *Barlow v. Rhodes*, 1 C. & M. 439. The defendant was under no obligation to join with the plaintiff in rebuilding the party wall, nor was he under any duty to reconstruct the stairway. *Sherred v. Cisco*, 4 Sandf. 480. The mere fact that the new building and the stairway were constructed in the same location as the old does not seem to be a satisfactory reason for reimposing upon the servient owner a burden of which he had been relieved by the accident. The Court proceeds upon the ground of hardship to the plaintiff if the easement were lost but it is equally as hard upon the defendant to compel him to again submit to the burden, although he could not have complained so long as the original right existed.

PROPERTY — PRESCRIPTION — HIGHWAYS. — *Held*, that the uninterrupted adverse use of a private road by the public for twenty years constitutes it a highway. *Blumenthal v. State*, 51 N. E. Rep. 496 (Ind.).

It is well settled law that the public may acquire a right of way by prescription. *Sprow v. Boston & Albany R. R. Co.*, 163 Mass. 330; *Blanchard v. Moulton*, 63 Me. 434. This is often put on the ground that adverse use for a certain period, varying in different jurisdictions, raises a conclusive presumption of a dedication of the road by the original owners and of an acceptance by the public authorities. *Fitchburg R. R. Co. v. Page*, 131 Mass. 391; *Reed v. Northfield*, 13 Pick. 94. It would seem more sensible, however, to base this rule of prescription on an analogy to the Statute of Limitations, as is now being generally done in this country. *Tracy v. Atherton*, 36 Vt. 503; *Wallace v. Fletcher*, 30 N. H. 434.

QUASI CONTRACTS — MISTAKE OF LAW. — Plaintiff, as executor, paid a legacy to an adopted child, erroneously believing her to be entitled to it by law. On discovering his mistake, plaintiff sued the child's guardian for the money. *Held*, that he cannot recover. *Phillips v. McConica*, 51 N. E. Rep. 445 (Ohio).

While money paid under a mistake of fact can generally be recovered, this case holds that there can be no such recovery when the mistake is one of law. The reason given for this distinction, namely, that ignorance of the law excuses no one, seems unsatisfactory, for the plaintiff does not ask to be excused for having injured any one, but merely that the defendant shall not be allowed to make an unjust gain out of the plaintiff's mistake. Where the mistake is one of fact, recovery is allowed because it is manifestly inequitable for the defendant to keep the money. This reason evidently applies just as strongly when the mistake is one of law, and there are a few cases supporting this view. *Mansfield v. Lynch*, 59 Conn. 320; *Culbreath v. Culbreath*, 7 Ga. 64. The great weight of authority, however, supports the principal case. *People v. Foster*, 133 Ill. 496; *Vanderbeck v. Rochester*, 122 N. Y. 285; *Carson v. Cochran*, 52 Minn. 67.

STATUTE OF FRAUDS — AFFIRMATIVE DEFENCE. — *Held*, that the Statute of Frauds is an affirmative defence. *Barnes v. Black Diamond Coal Co.*, 47 S. W. Rep. 498 (Tenn., Sup. Ct.).

Held, that the Statute of Frauds is available under the general issue. *Hillman v. Allen*, 47 S. W. Rep. 509 (Mo.).

Until the Judicature Acts it was uniformly held in England that the general issue raised this defence, and some American courts are in accord. *Reade v. Lamb*, 6 Ex. 130; *Birchell v. Master*, 36 Ohio St. 331; *Metcalfe v. Brandon*, 58 Miss. 841. To support these decisions it is argued that the statute merely introduced a new rule of evidence, and that the defendant, under a denial of the contract, may object to parol proof of it. But in that case a memorandum, made after action begun, would be good evidence, whereas, in fact, it is inadmissible. *Bill v. Bament*, 9 M. & W. 36. By the weight of American authority the statute must be pleaded affirmatively. *Crane v. Powell*, 139 N. Y. 379; *City v. Manufacturing Co.*, 93 Tenn. 276. This view is supported on the ground that the enactment of the statute did not affect the nature of a contract, but only prescribed that such contracts as came within its provisions could not be enforced unless the statute was complied with; that, therefore, proof of the contract shows a legal right in the plaintiff which the defendant must prove is unenforceable. The result thus reached is believed to be correct.

TORTS — ACTION FOR DEATH — PLEADING. — Action by an administrator for negligently causing the death of intestate, who, as defendant's servant, was incurring, at the time of the injury, an extraordinary danger of the employment. *Held*, that it is not necessary for plaintiff to allege and prove that decedent was unaware of the danger, because the action is based on a statute in which no mention is made of contributory negligence. *Lexington, etc. Mining Co. v. Stephens' Admr.*, 47 S. W. Rep. 321 (Ky.).

The court recognizes the rule, previously laid down in Kentucky, that in an action by a servant against his master for an injury not resulting in death, and arising from an extraordinary risk of the employment, an allegation that the servant was unaware of the danger is necessary to a complete statement of his cause of action. See *Bogen-schutz v. Smith*, 84 Ky. 342. The ground of distinction made in the principal case has not been generally adopted by the authorities. *Tiffany, Death by Wrongful Act*, §§ 63, 181. It would seem that on principle the same rules of pleading should apply, whether the action be brought by the servant himself in case he survives the injury, or by his administrator after death, inasmuch as both actions are founded on a violation of the same duty owed by the master to the servant at the time of the injury.

TORTS — IMPUTED NEGLIGENCE — PARENT AND CHILD. — The plaintiff, a child under the age of four, was injured by the negligence of the defendant, the negligence of the parent, in allowing the child to wander in the streets alone, contributing to the

injury. *Held*, that the negligence of the parent is imputable to the child so as to prevent recovery. *Juskowitz v. Dry Doc.*, etc. R. R. Co., 53 N. Y. Supp. 992 (Sup. Ct., Trial Term, N. Y. Co.).

South Covington, etc. R. R. Co. v. Herrklotz, 47 S. W. Rep. 265 (Ky.), *contra*.

There is a direct conflict of authority on this point. Some jurisdictions hold that the parent or guardian is the agent of a child *non sui juris*, and in respect to third persons the contributory negligence of the parent or guardian must, on the theory of agency, be imputed to the child. *Harfield v. Koper*, 21 Wend. 615; *Wright v. Malden*, etc. R. R. Co., 4 Allen, 283. The relation between the child and the parent, however, cannot be that of principal and agent, as all the essential elements of agency are wanting, the child having no control over the acts of the parent, and no right to remove him from power or appoint another in his stead. The better opinion, therefore, seems to be that the parent's negligence should not be imputed to the child, and he should not be precluded from recovery against one tortfeasor, simply because others have contributed to cause the injury. *Newman v. Phillipsburg Horse Car Co.*, 52 N. J. Law, 446; *Robinson v. Cone*, 22 Vt. 213.

TORTS — MALICIOUS PROSECUTION OF CIVIL SUIT. — *Held*, that an action for the malicious prosecution of a civil suit will not lie where there has been neither arrest of person, nor seizure of property, nor other special injury. *Smith v. Michigan Buggy Co.*, 51 N. W. Rep. 569 (Ill.).

The question was squarely before the Illinois court for the first time, and after a full examination of the authorities a decision was reached which is probably contrary to the weight of American judicial opinion. *Clossur v. Staples*, 42 Vt. 207; *McCardle v. McGinley*, 86 Ind. 538. The authority in accord with the principal case, however, is strong. *Wetmore v. Mellinger*, 64 Iowa, 741; *Muldoon v. Rickey*, 103 Pa. 110. The latter decisions must be put on the broad ground of public policy, and on that ground, it seems, ought to be supported. Allowing the action tends to increase useless and vexatious litigation, and one who honestly seeks redress through legal means should not be subjected to the probability of incurring another suit as a penalty for failure in his own. The successful defendant in a civil suit maliciously prosecuted suffers slight damage beyond the expense of the suit. He is reimbursed for this by way of costs, and if, as in most American jurisdictions, these do not cover his entire expense, that is a proper case for legislative action.

TORTS — PRIVATE ACTION FOR PUBLIC NUISANCE. — The defendants, a railroad company, were required by statute to maintain a draw in a certain bridge. Through the defendants' negligence, the draw fell and the plaintiff's ship was delayed several days, for which this action is brought. *Held*, that the plaintiff can recover for the delay. *Piscataqua Navigation Co. v. New York, etc. R. R. Co.*, 89 Fed. Rep. 362 (Dist. Ct., Mass.).

To entitle a person to bring a private action for a public nuisance, he must show that he has suffered special damage. The rule is often laid down that such special damage must differ in kind, and not merely in degree, from that which the rest of the public suffers. *Shaw v. Boston & Albany R. R.*, 159 Mass. 597; *Houck v. Wachter*, 34 Md. 265. It seems more in accordance with public policy, which must be the ultimate reason for allowing recovery in such cases, that if the plaintiff can show substantial damage he should be allowed to recover, even if the rest of the public have suffered the same kind of damage, though in an inappreciable degree. This is substantially the rule laid down in the principal case, and it certainly seems less artificial, and open to fewer objections, than the other. *Francis v. Schoelkopf*, 53 N. Y. 152; *Mayor v. Alexandria Canal Co.*, 12 Pet. 91.

TORTS — RAILROADS — DUTY TO TRESPASSERS. — *Held*, that employees in charge of a train passing through a city must keep watch for trespassers on the track. *Chesapeake, etc. Ry. Co. v. Perkins*, 47 S. W. Rep. 259 (Ky.).

The decisions on this point are in direct conflict. It has been held that employees of the railroad are under no duty toward the trespasser on the tracks until he has been discovered. *Wabash, etc. R. R. Co. v. Jones*, 163 Ill. 167; *Palmer v. Northern, etc. R. R. Co.*, 37 Minn. 223. There is abundant authority, however, in accord with the principal case, imposing on such employees the duty of keeping a lookout for trespassers in inhabited neighborhoods where they may be expected. *Whalen v. Chicago, etc. R. R. Co.*, 75 Wis. 654; *South, etc. R. R. Co. v. Donovan*, 84 Ala. 141. In Ohio, however, the court has gone a step further, and adopted what commends itself as the logical position. Here the rule of due care under the circumstances is applied to this case as to others, and holds that the engineer, consistently with his paramount duty towards the management of his train, must adopt ordinary precautions to discover danger to trespassers on the track. *Cincinnati, etc. R. R. Co. v. Smith*, 22 Ohio St. 227; *Pickett v. Wilmington, etc. R. R. Co.*, 117 N. C. 616.

TRUSTS — BREACH OF TRUST — WETMORE v. PORTER.—In an action by an executrix upon a promissory note, *held*, that evidence is inadmissible tending to show that the money for which this note was given was loaned by the executrix in a collusive attempt to defraud the estate. *Atwood v. Lister*, 40 Atl. Rep. 866 (R. I.).

The question, whether a trustee who has wrongfully disposed of trust property may maintain an action for its recovery as trustee has given rise to much difference of opinion. The decision in the principal case is in accord with the weight of authority. It is based upon the reasoning in *Wetmore v. Porter*, 92 N. Y. 76. See 12 HARV. LAW REV. 133.

REVIEWS.

THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. By E. Parmalee Prentice and John G. Egan. Chicago: Callaghan & Co. 1898. pp. lxxv, 386.

Shifting tendencies and the general development of law — hard as they may be to treat in a condensed work — cannot with any propriety be left out of an exhaustive special treatise. This fact the authors of the present work realized, and they have carefully carried out the treatment of their special subject, historically and analytically. The book embodies an effort, in the main successful, to take the point of view of the Supreme Court of the United States in regard to the so-called "Commerce Clause," to show how this point of view has changed with time, and how it has varied in the manifold different classes of cases involving the power to regulate commerce.

The aim of the framers of the clause is shown in its true light. They meant to give Congress power to prevent one State from enacting tariffs discriminating against the others and from passing navigation laws. No one thought the federal control was made exclusive; in fact a provision to make it so was struck out by the convention. All this the authors concede. They justify the doctrine of exclusive federal control by the general development of the country in ways wholly unanticipated, accentuated by a change in the relation of the States after the civil war. p. 35. These are the best explanations which the school of Marshall adopt. To the school of Kent and Taney they are not so convincing.

In stating the modern rule, that the control of commerce belongs exclusively to Congress in all matters admitting of uniform treatment, the authors are right, p. 27; but they make an unfortunate slip in assuming that this was the rule laid down by Mr. Justice Curtis in *Cooley v. Wardens of the Port of Philadelphia*, 12 How. 299. The doctrine of that case was that federal control is exclusive in matters which admit *only* of uniform treatment. The misconception of that rule has been shared by the courts. The consequent broadening of the exclusive power restricted the States to such an impossible extent that considerable sophistry had to be evolved in support of some State laws by means of narrowing the definition of a "regulation" of commerce. Hence a drift back towards a broader rule. Though the cause is ignored, the effect is noted. p. 206. Indeed, the authors are somewhat inclined to admit the difficulty of saying that all the State regulations of carriers which have been upheld are not regulations of commerce. p. 164. Yet, granted the modern rule with its modifications, it is very justly treated in connection with a great number of different circumstances.